FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-575

SMITH JOHN and HARRY SMITH JOHN, *Appellants,*

v.

STATE OF MISSISSIPPI, *Appellee.*

On Appeal From the Supreme Court of Mississippi

and

No. 77-836

UNITED STATES OF AMERICA, *Petitioner,*

v.

SMITH JOHN and HARRY SMITH JOHN, *Respondents.*

On Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF SMITH JOHN

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ARGUMENT

1. The Nature of Indian Country Jurisdiction

In response to defendant's reliance on *United States* v. *McGowan*, 302 U.S. 535 (1938), the State quotes a portion of the Court's opinion in that case to the effect that federal jurisdiction over the Colony

is not exclusive in all circumstances. Miss. Br. pp. 45-46. The State appears to imply by that reference that the Reno Indian Colony there involved is different from other Indian country. The converse proposition, that defendant and the United States are asserting exclusive federal jurisdiction over the Choctaw Reservation for all purposes, is suggested at Miss. Br. pp. 27 and 46. Both of the State's points are incorrect, and the quoted language from *McGowan* is correct as to Indian country generally.[1]

Federal jurisdiction over Indian country is not exclusive of state jurisdiction in all matters. As Defendant's Opening Brief points out (at pp. 48-49), the states retain normal authority over non-Indians in Indian country in all matters not affecting Indians, their property, or infringing tribal self-government.[2] Also Congress has delegated jurisdiction to the states over certain matters, *e.g.*, 25 U.S.C. § 231.

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[1] In fact the Reno Indian Colony has generally been treated the same as other Indian country since the Court's decision in *McGowan*. *E.g.*, U.S. Dept. of Commerce, Federal and State Indian Reservations and Indian Trust Areas (GPO 1974) pp. 324-25. The Colony's residents have organized under the Indian Reorganization Act and exercise powers of self-government thereunder. *See*, U.S. Dept. of Interior, Governing Bodies of Federally Recognized Indian Groups (GPO 1975) p. 16; U.S. Dept. of Interior, American Indians and their Federal Relationship (GPO 1972) p. 22.

[2] As to non-Indians, the State's brief appears to imply that the Choctaw trust lands have a substantial non-Indian population. Miss. Br. p. 46. This is not relevant, but it is also incorrect. Aside from federal Indian Service employees and spouses of Choctaws, there are virtually no non-Indian residents on Choctaw Indian Reservation lands. Less than 2 percent of the Reservation's residents are non-Indians.

Federal jurisdiction over Indian country preempts state jurisdiction in those areas necessary to fulfill the federal purposes of setting aside Indian country. *Bryan* v. *Itasca County*, 426 U.S. 373, 376 n.2 (1976). These include tribal self-government, *Fisher* v. *District Court*, 424 U.S. 382, 390 (1976), and the Indian Major Crimes Act, *United States* v. *Kagama*, 118 U.S. 375 (1886). In the latter decision (sustaining the Major Crimes Act), the Court's opinion notes the same point as the language the State quotes from the *McGowan* opinion: "[The Major Crimes Act] does not interfere with the process of the state courts within the Reservation, nor with the operation of state laws upon white people found there." 118 U.S. at 385.

2. Enabling Act Clauses.

The State points out that the Mississippi Statehood Act contains no clause reserving federal Indian jurisdiction, such as was included in the enabling or statehood acts of some other states. Miss. Br. p. 16. Presumably the implication is that such clauses are necessary for federal jurisdiction, but this is not the law. Nevada, the state where *United States* v. *McGowan, supra,* arose, had no such clause. Nor did California, where *United States* v. *Kagama, supra* arose. *See also, Apapas* v. *United States,* 233 U.S. 587 (1914); *Donnelly* v. *United States,* 228 U.S. 243 (1913). Federal authority to preempt state jurisdiction has also been sustained in Minnesota, *Bryan* v. *Itasca County,* 426 U.S. 373 (1976); New York, *The New York Indians,* 72 U.S. (5 Wall.) 761 (1867); and Georgia, *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832). None of these states is subject to such a provision.

Further, Congress recognized in Public Law 280[3] that federal authority is the same over states whether or not subject to this kind of clause. Section 6 of the original act provided for acquisition of jurisdiction by states with an enabling act disclaiming clause, and Section 7 provided for acquisition by other states, such as Mississippi. The only difference was in the requirement in the former states that the *state* undertake to amend its constitution to eliminate the disclaimer of jurisdiction over Indian lands; there is no distinction regarding federal authority.[4]

3. The Treaty of Dancing Rabbit Creek.

The State principally relies on the Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830), but the State's analysis ignores numerous subsequent actions which render that treaty a dead letter except as a land cession. As pointed out in Defendant's Opening Brief (at page 10), the treaty was largely superseded by the Treaty of June 22, 1855, 11 Stat. 611 (1855). The 1830 Treaty (art. 4) promised that the western lands of the Choctaws would never become a part of any state, but that promise was broken with Oklahoma's creation. Article 14, guaranteeing rights to the Mississippi Choctaws, has also been eliminated. Not only did the government fail to provide the land promised (Def. Open. Br. pp. 8-9), but as the State itself points

[3] Act of August 15, 1953, c. 505, 67 Stat. 588, codified in part and as amended, 18 U.S.C. § 1162; 28 U.S.C. § 1360; 25 U.S.C. §§ 1321-26.

[4] The existence of a federal enabling act clause might bear on other questions, such as whether a later federal statute repealed such a clause by implication. But nothing of this sort is relevant here.

out, the 1906 allotment of Choctaw lands in Oklahoma closed the Oklahoma Choctaw rolls to the Mississippi Choctaws. Miss. Br. pp. 42-43. This repealed article 14's promise that the Mississippi Choctaws "shall not lose the privilege of a Choctaw citizen."[5] The 1830 Treaty always was an anomalous one, since the Choctaws received neither lands nor money in exchange for cession of their Mississippi lands. (Their western lands had been provided under earlier treaties.) In any event, defendant relies on the more recent series of actions by Congress and the Interior Department to reassert federal protection over the Choctaws. These specific actions prevail over the inferences the State extracts from the treaty.

4. Tribal Existence.

The State argues that tribal existence is necessary for federal jurisdiction. Miss. Br. pp. 13-14. It is true that Indian status depends on tribal origin, but the State carries the argument well beyond what is supported by the law. Where the federal government has acted to divide or fragment the tribes, the government has always been able to deal with the results of its actions. *See,* Def. Open. Br. p. 45. In a number of circumstances, this Court has sustained federal jurisdiction over individual Indians without reference to

[5] The State also asserts that the Oklahoma Choctaw Tribe was terminated in 1906. Miss. Br. pp. 23-24. This is not correct. Congress passed an act to terminate the Oklahoma Choctaw Tribe in 1959, Act of Aug. 25, 1959, Pub. L. 86-192, 73 Stat. 420, but repealed it in 1970, Act of Aug. 24, 1970, Pub. L. 91-386, 84 Stat. 828. *See,* U.S. Dept. of Interior, Governing Bodies of Federally Recognized Indian Groups (GPO 1975) p. 5, listing the Oklahoma and Mississippi Choctaws separately. Also, the BIA maintains an Agency in Talihina, Oklahoma, in the Choctaw country.

any tribal organizations. *E.g., United States* v. *McGowan,* 302 U.S. 535 (1938) (Indians of Nevada); *Apapas* v. *United States,* 233 U.S. 587 (1914) (an Indian from one of the fragments of California tribes); *see also, United States* v. *Holliday,* 70 U.S. (3 Wall.) 175 (1866). Both Congress and this Court have defined Indian allotments as Indian country. 18 U.S.C. § 1151(c); *United States* v. *Ramsey,* 271 U.S. 467 (1926); *United States* v. *Pelican,* 232 U.S. 442 (1914). Federal criminal jurisdiction over such allotments does not depend on tribal existence in the sense of the State's argument.

The State also relies on an unpublished opinion of the Secretary of the Interior, dated August 31, 1936, stating that the Choctaws in Mississippi were not then a separate tribe. Miss. Br. p. 34. The opinion does so state, but the State neglects to report the remainder of its conclusions. The opinion was titled "Purchases Under the Wheeler-Howard Act" and concerned the question of the form in which the United States should take title to trust purchases for Choctaws in Mississippi under Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. Solicitor Margold concludes that the lands could not be taken in tribal trust, because there was no tribe at that time. He therefore recommends:

> Therefore, I suggest that the titles now being acquired be taken as follows:
>
> > The United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior, until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe pursuant to the Act of June 18, 1934 (48 Stat. 934), and then in trust for such organized tribe.

Therefore this opinion when read in full confirms the contemporaneous view of the Interior Department that the Mississippi Choctaws were within the scope of the IRA and entitled to organize pursuant to it.[*]

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[*] For the Court's use, defendant will lodge a copy of this opinion with the Clerk prior to argument.